Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

ROUTE 17 CORPORATION, a Delaware Corporation registered to do business at Route 17, and Wellsburg Crossover, Ashland New York,

Petitioner,

vs.

TOWN OF ASHLAND, SHELDON ROBINSON, EDWARD BLY, EARL L. STATON, ANDREW J. GOTHAM, WALTER JILSON, GARY L. PATELUNAS, Individually and as Code Enforcement Officer, and JOSEPH J. BALOK, JR.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

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96 pp

QUESTIONS PRESENTED FOR REVIEW

1. Has this Court, under its decisions in Young v. American Mini-Theaters, 427 U.S. 71; Schad v. Borough of Mt. Ephriam, 452 U.S. 61; and Renton v. Playtime Theaters, 475 U.S. 41 permitted a community to constitutionally single out protected press expression, and utilizing a criminal law, to regulate the location where, and the ratio of quantities of, publications having defined sexual content, allowed to lawfully be kept as stock-in-trade observable for patrons without affirmative evidence from contemporary studies showing that such printed materials with such content observable by patrons in purchasing selection conduct alone, creates harmful or undesirable secondary effects upon the surrounding community?

2. Is this Local Law of Ashland, New York a facially invalid content based criminal law, under the First and Fourteenth Amendments, because it bases its penal prohibitions and punishments against press dissemination conduct only upon the content of stocked press publications when constituting substantial or significant stock for patron observation of the press works?

3. Did the Circuit Court err in finding that Route 17 Corp. waived its claim, that the loose paper factual evidence exhibits were improperly submitted to the trial count ex parte, under F.R.C.P. 56 (e) without being attached to the affidavit or served therewith, on the basis it did not present such claim when the materials were submitted to the Court, since the facts and documents show Route 17 Corp. was unaware of their improper

ex parte delivery to chambers and therefore could not object to consideration of them, as the lack of presentation of such documents was even made the basis of counsel argument in open court, and neither Respondents' counsel or the Court disputed Petitioners argument of such or in any way referred Petitioner to the previously delivered papers?

LIST OF PARTIES TO THE PROCEEDINGS UNDER RULE 14.1(b) and entities UNDER RULE 29.1

All parties to the proceeding below in the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, as well as in the District Court appear in the caption of the case and are the only interested parties.

Petitioner, Route 17 Corporation, is a private corporation which is incorporated under the laws of Delaware and is authorized to, and does, conduct its business in the State of New York. Route 17 Corporation has no publicly traded stocks, nor parent, subsidiary or affiliate corporations to list pursuant to Rule 29.1.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINIONS AND JUDGMENTS BELOW

The opinion, and order of the United States Court of Appeals for the Second Circuit affirming the District Court decision is not reported and is reproduced in the Appendix at pp. a1. However, the unpublished opinion is

noted in 50 F.3d. 3 Tables. The Court of Appeals unreported order denying rehearing and rehearing in banc is set forth in the Appendix.

The District Court's opinion and order denying Petitioner's motion for summary judgment and granting Respondents' request to dismiss is similarly unreported and is reproduced in the Appendix. The District Court's post-decision order respecting documents for inclusion in the record on appeal is also reproduced in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

Route 17 Corporation operated the only book and video store in the town of Ashland, New York. It ceased business activity when served with a "cease and desist order" issued by the town and thereafter filed its federal civil rights complaint for Declaratory and Injunctive Relief, damages, costs, and counsel fees.

Jurisdiction in the District Court was founded upon 42, U.S.C., Sect. 1983 and 1988 as well as 28, U.S.C., Section 1343 (a) (3) and (4) and under 28, U.S.C., Sect. 1331 with respect to these civil rights claims. Jurisdiction to render declaratory and injunctive relief also arose under 28, U.S.C., Sect. 2201 and 2202 as well as F.R.C.P. 57 and 65.

Jurisdiction in the Court of Appeals is provided under 28, U.S.C., Sect. 1291 as the judgment was final under F.R.C.P. 54 (b) and 58.

The jurisdiction of this Court is invoked under 28, U.S.C., Sect. 1254 (1) and Supreme Court Rule 13. The issues were presented to the District Court by Petitioner's Motion for Summary Judgment and Permanent Injunction and by the Respondents' request for dismissal. Corporation's motion and granted the Town parties' Motion to Dismiss. The District

Court order dismissing all of the Store's claims and disposing of the Complaint and the claims of all parties was final.

The unreported memorandum opinion and order of the Court of Appeals, affirming the District Court, was entered on February 15, 1995. A timely petition for rehearing, with a suggestion that the appeal be re-heard in banc was filed. This petition for rehearing was denied on April 21, 1995. Mandate issued April 28, 1998. Thus the decision was final.

CONSTITUTIONAL RULE AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the First and Fourteenth Amendments, the Ashland comprehensive zoning ordinance, and Local Law No. 1 for 1990 of the Town of Ashland, New York are reproduced in the appendix to this Petition.

STATEMENT OF THE CASE

Route 17 Corporation agreed to a lease

for a commercial zoned building from T and R Realty Corp. in the Town of Ashland, New York, subject to being put into lease form, which lease was thereafter executed June 5, 1991. It commenced doing business on October 28, 1991.

Route 17 opened a retail outlet in which it displayed to patrons for off premises sale and consumption expression materials including hundreds of publications, books, novels, magazines, newspapers, and videotape film, as well as other items. In addition, Route 17 provided on premises video viewing booths. A portion of this expression print product is reasonably classified as sexually oriented in nature and may contain depictions or written descriptions and matters relating to sexual activity or anatomical areas as set out in Article 1 of Local Law No. 1 of Town of Ashland. Additionally it provides on-site video tape motion picture viewing facilities

and equipment which permit patrons to personally select the desired film for viewing and for that patron to operate the supplied integrated equipment to enable customer viewing in a booth of those patron selected exhibited motion picture films. Display of publications to patrons is provided to enhance selection for purchase and removal. The video viewing booth exhibitions, and the display for observation of videotapes and the sale of publications and videotapes are unregulated by this law. Thus Petitioner is permitted to stock, possess and sell publications so long as it does not permit them to be observed by its patrons in the premises in their selection process prior to off premises sales. Thus it is a restriction on pre-sale selection of all publications on the premises.

The Town of Ashland, as a result of alleged rumors of an adult bookstore locating at the property, then commenced to conduct

meetings seeking ways to take action against allowing the completion and opening of that type establishment which in December, 1990 resulted in the Town enacting Local Law No. 1 of 1990.

On October 31, 1991 three days after store opening Patelunas, personally appeared at the bookstore premises and purchased a selected few of the speech and press and videotape items from the store and, upon paying for the same, delivered and served the previously prepared "Cease and Desist Order" issued and signed by him ostensibly in the capacity of Town of Ashland Code Enforcement Officer.

The bookstore on November 7, 1991 complied with that Order and ceased all business activity and closed its premises eleven (11) days after opening.

The Town of Ashland under New York Town Law enabling statutes in 1963 had adopted its

Comprehensive Zoning Plan and Town Zoning Map as required for zoning enactments and established six zoning districts and specified the permitted uses therein with administrative procedures.

The process of enacting this separate non-zoning local law, however, had its Genesis in the introduction of and approval of Resolution No. 5 on May 7, 1990 by the Town Board of the Town of Ashland which imposed a 'moratorium" for the purpose of prohibiting anyone from operating any "adult book stores" or any other business restricted to just adults until 9/30/90. In the following months the issue as to adult bookstores in accord with state and town law was forwarded to the Town Planning Board for initial consideration. The Town planners subsequently proposed the existing Town Board adopt a zoning ordinance amendment to the existing Town Comprehensive Zoning Plan, map, and laws as prepared by them

to create a new "Industrial Zone" which would be located in the western extremity of the Town and also to amend the existing zoning map and thereby limit "adult uses" establishments to this new industrial zone.

The Town of Ashland Town Board on October 19, 1990 published its public notice of the hearing on that proposed zoning amendment from the Planning Board for October 24, 1970. However, at the 10/24/90 Town Board meeting upon motion, after the hearing on the proposed zoning amendment ordinance, the entire matter and proposed zoning ordinance and map amendment issue was "tabled". On December 12, 1990 the Town Board at this later meeting conducted a public discussion by Balok as to what could be done with "Adult Book Stores". A resolution No. 1 was made to adopt a Local Law to be designated as No. 5 of 1990 concerning "Adult Book Stores" with criminal provisions which was then adopted. It

prohibited the future establishment of a bookstore, in which publications were to be observed by patrons, when the store is within certain distances of other uses and buildings. It made no reference to any land use zoning class.

The ordinance in Article I, made it unlawful "to hereafter establish" such a store with such quantity of press materials for patrons to observe within certain distances of other premises. Article II, defined the term "obscene" and made it a crime to promote obscene material. That Article is not at issue. Article III defined the terms "harmful to Minors" and sexual conduct which that Article made it illegal to promote such materials to minors. That Article similarly is not at issue here.

Route 17 Corporation filed the instant action in the Western District of New York challenging the constitutionality of Local Law

No. 1 of 1991 of the Town of Ashland, New York.

Following discovery, the bookstore filed its Motion for Summary Judgment and Injunctive Relief with Affidavit and attached and incorporated Exhibits. The Town Defendants filed their affidavit and attached exhibits in opposition and requested the Court to deny the Summary Judgment sought by the bookstore and dismiss the Complaint.

The Trial Court conducted a hearing in Court for argument on those issues on March 17, 1994. During the argument proceeding Petitioner's counsel stated on the record that the Defendants had failed to produce such alleged prior studies supposedly relied upon and that it was their duty to do so but had not produced them in Court and summary judgment was proper. Neither the Court or defense counsel denied the failure to produce evidence of such studies or disclosed that

defense counsel had previously delivered such paper documents to chambers ex parte. Judge Larimer rendered his memorandum opinion and judgment on June 13, 1994 denying the Motion for Summary Judgment and holding the ordinance constitutional and granting the Town Defendants request for dismissal of all claims. A timely notice of appeal was filed to the Court of Appeals for the Second Circuit.

That appeal brought those issues, the correctness of the Trial Court's ruling, and the validity and propriety of review and consideration by the Trial Judge of certain papers submitted directly by the Town's attorney to the Trial Court without attachment to or incorporation in the motion affidavit of defense counsel under Rule 56 (e) and without compliance with Rules 10 and 11 of FRCP and also without service of them or even a certificate of service, under Rule 5, upon

counsel for the bookstore and thus denying the opportunity for Appellant to timely object or oppose their content.

The Circuit Court affirmed the District Court's decision, and rejected all issues presented, including the wrongful prejudicial ex parte delivery without service, of the loose papers containing other cities studies, to chambers by finding a waiver for failure to object to the trial Court's consideration of them even though Petitioner's counsel lacked knowledge of their delivery and had even challenged the lack of them subsequently in open Court during oral argument on the summary judgment motion and response without correction or objection by opposing counsel or the Court.

ARGUMENT

I.

THIS LOCAL LAW IS INVALIDLY ENACTED BOTH PROCEDURALLY AND UNDER NEW YORK STATE LAW WITHOUT FACTUAL SUPPORT OF

RELEVANT STUDIES OF SECONDARY EFFECTS

The New York Constitution, Art. 1x, Local Governments, Sect. 1 (a) provides the Town of Ashland with the power to adopt local laws. Under Chapter 36-a of the New York Consolidated Laws, Sect. 10 the Town of Ashland is statutorily given the power to enact and amend laws that are not inconsistent with general state law. Town Law Sect. 263 compels the enactment of zoning laws in accordance with a "comprehensive plan". The Court of Appeals held that the issue raised on appeal concerning the evidence and procedure factually supporting its enactment and failure to following state land use zoning law thereby creating a facially invalid prior restraint of speech was a state law claim that the law was illegally adopted and not raised before the District Court. The Court of Appeals thus refused to pass on the issued intended and

believed to be properly raised and decided citing Singleton v. Wulff, 428 U.S. 106, 120. This was incorrect but it was possibly due to Petitioner's questions presented No. 2 being unartfully drawn coupled with the Court's wrongful waiver determination of Rule 56 (e) violations. However, the issue was whether their local law was facially invalid and not a proper land use law with prior factual support.

At least as crucial here is the failure of this Local law, under Town Law, Sect. 263, to be enacted with adequate factual support of harmful effects in accordance with such a "comprehensive plan". Udell v. Haas, 21 N.Y. 2d 463, 288 N.Y.S. 2d 888, 235 N.E. 2d 897, Carlton Tennes Assoc. Inc. v. Town of Clay, 131 Misc. 2d 522, 500 N.Y.S. 2d 908. That is also the issue presented below. It is clear that it was not enacted in accordance with the comprehensive plan.

This legislatiYon then is not enacted to alleviate harmful secondary effects from such businesses in furtherance of protecting the Town's morals, health or safety from business dispensing such materials by applying it only to a business having printed press publication but not the other disseminators of similar materials which renders the law a discriminatory enactment.

Where the Town statutory classification approaches sensitive and fundamental personal rights, the classification must be closely scrutinized in light of its asserted purposes and shown to be no greater than is necessary to alleviate those evils; it is the Town which bears the heavy burden of justifying its classification by demonstrating that it is necessary to promote a substantial governmental interest. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Harper

v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). In addition, the State must survive an examination of the means it chose to determine whether there exists any less discriminatory alternative to achieve its asserted interest. Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 909-910 (1986) (plurality); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shapiro v. Thompson, 394 U.S. 618, 637 (1969).

II.

THE RESPONDENTS HAD THE BURDEN OF PROOF BUT FAILED TO ESTABLISH THE CONSTITUTIONALITY OF THE PROVISIONS OF THIS LOCAL LAW WHICH SELECTIVELY INFRINGES ON THE EXERCISE OF PRINTED SPEECH AND PRESS RIGHTS

Contrary to the normal rule, the Town must bear the burden of establishing the constitutionality of any law regulating the exercise of First Amendment rights. See Schad v. Borough of Mt. Ephriam, 452 U.S. 61. The Tenth Circuit in Association of Community

Organizations for Reform Now (ACORN) v. Municipality of Golden, 744 F.2d 739, 746 (10th Cir. 1984) in accord with this Court and other circuits stated this principle:

> [T]hough duly enacted laws are ordinarily presumed constitutional, when a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality. E.G., ACORN v. City of Frontenac, 714 F.2d 813, 817 (8th Cir. 1983); Rosen v. Port of Portland, 641 F.2d 1243; 1246 (9th Cir. 1981) (such laws are presumptively unconstitutional and state bears burden of justification); Espinosa v. Rusk, 634 F.2d 477, 482 (10th Cir. 1980) (regulations which restrict exercise of First Amendment rights by requiring prior approval are suspect and face on unfavorable presumption of invalidity), summarily aff'd 456 U.S. 951, 102 S. Ct. 2025, 72 L. Ed. 2d 477 (1082). (Emphasis added) 744 F.2d 739, 746.

See also Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 29 L.Ed. 2d 1, 91 S. Ct. 1575, 1577 (1971); New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1255 (3rd Cir. 1986); City of Watseka v. Illinois Public Action Coalition, 796 F.2d 1547 (7th Cir. 1986), Aff'd _____ U.S. _____ (1/20/87);

Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 248, 252 (7th Cir. 1985);

The Town Board had no competent supporting evidence given to it to support this enactment. This Court in Schad v. Borough of Mt. Ephriam, 452 US 61, 101 S. Ct. 2176 found that Young v. American Mini Theaters, 427 US at 71, 96 S. Ct. at 2452 also required zoning ordinances affecting only adult theaters be "justified" by the city, that is, such articulated reasons must be factually justified for a Town to reasonably rely upon for its speech restrictive enactment. The Mt. Ephriam court required a "sufficiently substantial government interest" be shown when a broad category of protected expression was involved.

Turning to the laws provisions itself it is readily apparent that this is simply a content based penal statute with three separate criminal prohibition subjects in it.

Beyond criminalizing obscenity and barring the dispensing of only harmful materials to minors there is no justification for restricting targeted book sale displays separate from their sales or film and video and film exhibition activity as constituting quantities of stock-in-trade and allowing all other adult material and all adult businesses.

III.

THE LOCAL LAW CANNOT BE SHOWN TO HAVE BEEN ENACTED ON THE BASIS AND STUDIES IN THE ISLIP CITY ENACTMENT OR SURVEYS

The Town in its defense below sought to support and base its enactment upon studies from the Town of Islip (see Islip v. Caviglia, 73 NY 2d 544, affirming 141 Ad2d 148) and results of alleged survey forms in the Village of Wellsburg.

Leaving to the side the fact that the survey documents were improperly submitted and thus improperly considered below the alleged survey itself is patently invalid and can

support no findings and relevance. In fact, the Town's "Statement of Uncontroverted Facts" submitted at hearing does not set out any factual allegations that such evidence was submitted to or considered by the Town Board.

The alleged survey forms were claimed to be ones used by the Village of Wellsburg (a small incorporated Community in the Town's boundaries) which was supposedly conducting a study whether adult bookstores should be regulated by that Village, Even a cursory viewing of them show that there are numerous reasons why they cannot be considered, (1) they are undated; (2) only personal beliefs are sought; (3) no limiting as to age, voter, actual residents, or property owner; (4) how many residents are there and how many distributed and how many responses; (5) actual residence verification ignored; (6) they were given right to omit their name and addresses in responding and many were left anonymous;

(7) not listed who caused their distribution; (8) who they were sent to; (9) what their beliefs were factually founded upon or (10) length of time of residence. There was no evidence that the Town Board saw them, considered them or even knew of them. Finally no mention of them by the Town Board exists even in the minutes of the meetings and what the survey results would mean with regard to Ashland laws.

The Town of Islip alleged studies also are not applicable here. Islip studied, by individual site analysis, all adult businesses as well as review of studies and ordinances of other jurisdictions utilizing laws to regulate all adult businesses.

Taking the sworn testimony of Balok, Patelunas and Doland, the Town Board Secretary, at the adversarial live depositions submitted by Petitioner to the Court as motion exhibits prior to their later reflection and

submission in their responding affidavits, attempting to explain their prior adversarial testimony under oath, they readily admitted they had no such studies and results to produce and that the Town Board never saw such studies or survey when this law was considered.

IV.

THIS LOCAL LAW IS INVALID ON ITS FACE AND AS APPLIED BECAUSE IT IMPOSES A CONSTITUTIONALLY PROHIBITED PRIOR RESTRAINT AND BURDEN ON PETITIONER AND PRINTED SPEECH BASED UPON CONTENT AND IS NOT A REASONABLE GENERAL TIME, PLACE AND MANNER RESTRICTION

This Local law is not supported by any articulated and factually supported substantial governmental interest and under the facts its restrictions has not been shown to further any appropriate articulated secondary effects elimination or substantial government interest. Similarly it is not narrowly tailored nor directed to achieve any stated goal unrelated to speech content

suppression. Finally the restrictions it imposes are substantially greater than reasonably necessary to the furtherance of all alleged interest.

It is fundamental precept of the First Amendment to the United States Constitution that all expression, whether it is written, pictorial or by way of performance, is presumptively protected against government interference and restraint. In this case, there is no contention or issue that minors are allowed on the plaintiffs' business premises or that any material sold or exhibited violated the obscenity laws.

Therefore, the kinds of expression occurring at the plaintiffs' places of business are presumptively protected by the First Amendment to the Constitution of the United States.

In considering legislation, in the form of prior restraints against classes of speech

and speech activities, this Court has stated that when challenges are raised on the ground that the legislation affects First Amendment rights:

> the standard of review is determined by the nature of the right assertedly threatened or violated rather than the power being exercised or the specific limitations being imposed. Thomas v. Collins, 323 U.S. 516, 529-530 (1945).

Schad, supra at 60.

Due to the First Amendment's paramount position among all constitutional rights due process, under the Fourteenth Amendment to the United States Constitution, requires that all laws which seek to regulate First Amendment activities must be sufficiently definite and certain so as not to be impermissibly vague. In ordinary land use regulations their validity is largely dictated by the decisions in Young v. American Mini Theaters, Inc., 427 US 50, Renton v. Playtime Theaters, 475 US 41 and Schad v. Borough of Mt. Ephriam, 452 US

61. The regulating authority is not favored, in the analysis, with any presumption of validity of its restriction of First Amendment rights. Schad v. Borough of Mt. Ephriam, 452 US 61, 77 (1981) (presumption of validity carries little, if any, weight where regulation infringes on rights of expression protected under First Amendment); Thomas v. Collins, 323 US 516, 630 (1945); reh. den. 323 US 819 (1945) (usual presumptions supporting legislation balanced by referred place given to freedom secured by First Amendment).

Accordingly, the State may not simply rely upon a statement of legislative purpose. Instead, the State must be prepared to "... articulate, and support, a reasoned and significant basis for its decision" to regulate. Schad v. Borough of Mt. Ephraim, 452 US 61, 77 (1981). And see, Schneider v. State, Los Angeles v. Preferred Communications, 476 US 488, 496; Bridges v.

California, 314 US 252 (1941)

Crucial, then, to the Supreme Court's holding in both Younger and City of Renton was the determination that the ordinance under scrutiny was supported by an adequate "factual basis." On the other hand, where adult land use and content-specific regulations restrict the exercise of free speech rights and where the regulating authority has failed to demonstrate that its enactment is supported by such a factual basis, the courts have unhesitatingly invalidated the regulation. Schad v. Borough of Mt. Ephraim, 452 US 61.

In his concurrence in Young v. American Mini Theaters, Justice Powell wrote that a zoning scheme such as Detroit's, in order to survive constitutional scrutiny, must satisfy the test set forth in United States v. O"Brien, 391 US 367 (1968): (1) whether the enactment is within the constitutional power of the government; (2) whether it furthers a

substantial governmental interest; (3) whether that interest is unrelated to the suppression of free expression; and (4) whether the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. Convinced the Detroit plant met all parts of the test, Justice Powell joined the plurality in upholding the plan. He cautioned, however:

> ... Although courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression, it is clear that this is not such a case. 427 US 50, 84.

In the wake of American Mini Theaters, local governments around the country experimented with zoning as a way to regulate (and in many cases, eliminate or ban) adult businesses. Many of these schemes failed to consider the caveat in American Mini Theaters: the legality of the Detroit scheme "... would

be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." Id. at 71, n.35.

Although this Court modified the requirement somewhat as to what studies and factual foundation a restrictive zoning ordinance could be based upon. That modification only dealt with the permission to use the valid results of studies and findings of other cities. It did not modify the quantum nor the burden of actual legislative review and adoption of such proper government studies and to tailor their enactment in accordance with constitutional parameters.

At the outset, the Renton Court stated:

> "This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communications."

(Citations omitted.) Renton, 475 US at 46-47. The "substantial governmental interest" shown in Renton was that of combatting the undesirable secondary effects of adult theaters. In a statement crucial to this case, the Renton Court noted:

> "[T]he Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in Schad v. Mount Ephraim, 452 US 61[, 68 L.Ed. 2d 671, 101 S.Ct. 2176] (1981), and Erznoznik v. City of Jacksonville, 422 US 205[, 45 L.Ed.2d 125, 95 S.Ct. 2268] (1975)."
>
> Renton, 475 US at 52, 106 S.Ct. at 931.

In contrast, the Town of Ashland here has not shown that adult businesses with predominantly "take home" printed books, magazines and other periodicals (which clearly are covered by the ordinance) have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows; thus the "substantial governmental

interest" portion of the test has not been met.

In addition to the fatal defects discussed above the local law suffers from an even greater defect that of narrow tailoring and overbreadth which fails to allow for reasonable alternative means of dissemination. That is, there are not only inadequate alternative sites and avenues for dissemination of these printed materials but as shown by the affidavit and the land survey engineers and mapping there are no available alternative sites at which to locate. Renton, 475 US 41, 106 S. Ct. 925, 930. This law even requires a distance of 500 feet from the property line of a single rooming unit which alleviated hotels, motels, apartments over business and also as applicable here caretakers living quarters.

V.

PETITIONER DID NOT KNOW ABOUT

AND COULD NOT WAIVE WRONGFUL
SUBMISSION OF PAPERS COURT RULED OPINION

Route 17 Corporation designated and submitted all of its exhibits for trial court consideration attached to and incorporated into its affidavit supporting its motion for summary judgment. Counsel for the Defendants did likewise. However, the subsequent delivery of the documents by counsel for the town constituting supposed Village surveys and including miscellaneous papers, held together by a rubber band, were not attached to nor incorporated into Defendants affidavit. In fact, that affidavit stated that they "will be handed up to the Court." This is a statement of future intended conduct not a present act at all. They nothing more than unsubstantiated papers unserved upon the store's counsel and were invalid for consideration under Rule 56, F.R.C.P. by the Trial Court. They were invalid in form

containing no title page, docket number, case titling, certificate of service or signature and should not have been considered as they were not served upon counsel nor filed with the Clerk but simply delivered to chambers. De Cinto v. Westchester County Med. Cntr., 821 F2d 111, (CA2, 1987) cert. den. 484US965.

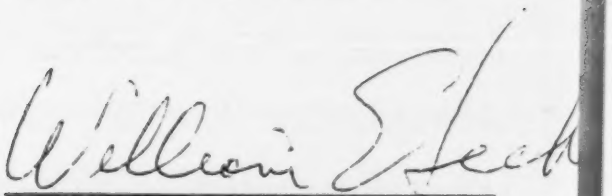
The Trial Court as shown by its post hearing opinion and judgment reviewed and improperly considered these papers and in its ruling. For this reason, the decision should be reversed also.

CONCLUSION

Based upon the foregoing arguments and authorities, as well as the importance of the constitutional issue raised in the Petition, Petitioner respectfully requests this Honorable Court to grant the Writ and either reverse the judgment and order of the Court of Appeals and declare the Ashland Town Local Law unconstitutional, or order briefing and

hearing on the merits.

Respectfully submitted,



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Counsel for Petitioner

APPENDIX A

91-cv-6515

RKW

LARIMER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United states Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the Fifteeth day of February one thousand nine hundred and ninety-five.

Present:

Honorable Thomas J. Meskill,
Honorable Ralph K. Winter,
Honorable Joseph M. McLaughlin,
Circuit Judges.

ROUTE 17 CORPORATION, a Delaware Corporation registered to do business at Route 17 and Wellsburg Crossover,

Plaintiff-Appellant,

O R D E R

V.

94-7708

TOWN OF ASHLAND, SHELDON ROBINSON, EDWARD BLY, EARL La STATON, ANDREW J. GOTHAM, WALTER JILSON, GARY La PATELUNAS, Individually and as Code Enforcement Officer, and JOSEPH J. BALOK, JR

Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Route 17 Corporation ("Route 17"),, a Delaware corporation registered to do business in the Village of Wellsburg, which is in the Town of Ashland, in the County of Chemung, New York, appeals from Judge Larimer's grant of summary judgment to appellees.

On appeal, Route 17 claims: (i) Local Law No, 1 was improperly adopted; (ii) defendants-appellees failed to carry their burden that Local Law No. 1 was constitutional; (iii) information supporting Local Law No. 1 adduced in the district court by defendants-appellees was inapposite to Local Law No. 1; (iv) Local Law No. 1 is a prior restraint not justified by a substantial government interest; and (v) certain exhibits adduced by defendants-appellees were not properly introduced in the district court.

Route 17 did not raise in the district court its claim that Local Law No. 1 was improperly adopted. We discern no reason to depart from our general rule of refusing to consider matters that were not passed on by the district court. See Singleton v, Wulff, 428 U.S. 106, 120 (1976); First Nat'l Bank v, Pepper, 454 F,2d 626, 636 (2d Cir. 1972).

Route 17 claims that defendants-appellees failed

to demonstrate that Local Law No. 1 was constitutional, We disagree. The Supreme Court has found that regulations that either disperse or concentrate adult-oriented businesses may be analyzed under content-neutral analysis, See City of Renton v. Playtime Theaters, 475 U.S. 41, 49 (1986) ("[Z]oning ordinances designed to combat the undesirable secondary effects of [businesses purveying sexually explicit

materials] are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations.") (citing Young v. American Mini Theaters, 427 U*So 50 (1976)). The Town of Ashland relied on studies and information gathered by other municipalities to conclude that adult-oriented establishments can give rise to a panoply of social difficulties. The Supreme Court has held that it is permissible to so rely, and it was also permissible for the members of Ashland's governing body to rely upon an agent -Town Attorney Joseph Balok -- to research such information. See Renton, 475 U.S. at 51-52. Finally, there were alternative avenues of communication. A relatively large percentage of the land in the Town of Ashland that is zoned for business use could have been used for an adult bookstore under Local Law No, 1. See Marty's Adult World v. Town of Enfield, 20 F.3d 512, 516 (2d Cir. 1994) (banning activities in some places in community but not others does not unreasonably limit alternative avenues of communication).

Route 17's third claim is that the information

the Town of Ashland relied upon was inapposite, The Supreme Court has held that a city can rely on other cities' experiences and on the findings summarized in a court opinion to promulgate an adult theater zoning ordinance. Renton, 475 U.S. at 51. We therefore find that the Town of Ashland could properly rely on studies done by the Town of Islip and on information contained in court opinions.

Route 17's fourth claim that Local Law No. 1 amounts to an unjustified prior restraint bears some resemblance to its second claim. In any event, we find that Local Law No. 1 was a time, place, and manner restriction, Renton, 475 U.S. at 46, because a significant fraction of the land both zoned for business use and near a highway in the town could have been used for an adult-oriented establishment under Local Law No. 1 without any purchase of residential property. Therefore, the information reviewed by the staff of the town board provided a sufficient basis for the regulation.

Route 17's fifth claim is that the exhibits submitted by defendants-appellees to the trial court were not properly attached or submitted to the court. Thus, under Federal Rule of Civil Procedure 56, it was error for the district court to consider this

evidence. See Fed. R. Civ. P. 56(e) ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto- or served therewith."). As Route 17 did not make this claim when the materials were submitted to the court, any potential defect was waived. DeCintio v. Westchester County Medical Ctr,., 821 F,2d 111, 114 (2d Cir.) (failure to object below constituted waiver of objection for Rule 56(e) defect), pert. denied, 484 U*So 965 (1987)*

We therefore affirm.

Docket # 94-7708

Hon. Thomas J, Meskill, U,S,C,J.
Hon, Ralph K. Winter, U.S.C,J,

Hon, Joseph M, McLaughlin, U.S.C,J,

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CAUSES BEFORE THIS OR ANY OTHER COURT UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III, CLERK

APPENDIX B

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of April one thousand nine hundred and ninety-five.

Route 17 Corporation

Plaintiff-Appellant
v Dkt No: 94-7708

Town of Ashland, et al 2

Defendants-Appellees

A petition for rehearing containing a,suggestion that the action be reheard in banc having been filed herein by the appellant Route 17 Corporation.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

APPENDIX C

91-cv-6515
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the
Second Circuit held at the United States Courthouse in the City of New York, on the Fifteeth day of February one thousand nine hundred and ninety-five.

Present:

Honorable Thomas J. Meskill,
Honorable Ralph K. Winter,
Honorable Joseph M. McLaughlin,
Circuit Judges.

ROUTE 17 CORPORATION, a Delaware Corporation registered to do business at Route 17 and Wellsburg Crossover,
Plaintiff-Appellant

ORDER

V.
94-7708

TOWN OF ASHLAND SHELDON ROBINSON, EDWARD BLY, EARL L. STATON, ANDREW J. GOTHAM, WALTER JILSON, GARY Lo PATELUNAS, Individually and as Code Enforcement Officer, and JOSEPH J. BALOK, JR.
Defendants-Appellees

Appeal from the United States District Court for

The Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

APPENDIX D

STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROUTE 17 CORPORATION,

Plaintiff,

DECISION

ORDER

V.
91-CV-6515L

TOWN OF ASHLAND, SHELDON ROBINSON, EDWARD BLY, EARL STANTON, ANDREW GOTHAM, WALTER JILSON, GARY M. PATELUNAS and JOSEPH J. BALOK, JR., ESQ.

Defendants.

This action was brought by plaintiff, Route 17 Corporation ("Route 17"), pursuant to the First and Fourteenth Amendments of the United States Constitution for declaratory and injunctive relief and for compensatory damages. Specifically, Route 17 requests that the Court declare a local zoning ordinance of the Town of Ashland, New York ("the Town"), which regulates adult bookstores, unconstitutional. Before the Court is Route 17's motion for summary judgment and a permanent injunction and defendants' cross-motion for summary judgment. For the reasons that follow, Route 17's motion is

denied and defendants' cross-motion is granted. Defendants are the Town, the Town Supervisor, members of the Town Board, the Town's Code Enforcement and Zoning Officer and the Town's attorney.

FACTS

The property at issue in this action is owned by T & R Realty Corporation ("T & R Realty"). On August 31, 1990, T & R Realty submitted building plans and specifications to the Town for construction of a "retail outlet commercial building.' On September 7, 1990, defendant Gary Patelunas, Code Enforcement Officer for the Town, issued a building permit to T & R Realty and construction commenced. Upon completion of the building on May 31, 1991, Patelunas issued a certificate of occupancy to Route 17 to conduct business as "VideoNews Stand-Mercantile." T & R Realty leased the property to Route 17, which planned to operate an adult bookstore on the premises.

At the same time that the certificate of occupancy was issued, Patelunas delivered a letter to T & R Realty, along with a copy of @ Law No. 5 of 1990. Patelunas' May 31, 1991 letter stated: 'Please be advised that the Town of Ashland now has a Local Law #51990, pertaining to the Regulating of the Operation and Maintenance of Adult Book Stores.' Local Law No. 5 ("the ordinance") regulates adult bookstores by precluding their operation at certain locations within the Town. Pursuant to the ordinance, it is unlawful to operate an adult bookstore within 150

feet of a school bus stop, within 1000 feet of a library, park or playground, and within 500 feet of a residential dwelling, church, convent, monastery, school or other adult bookstore.

The ordinance defined adult bookstore as: 'An establishment having, as a substantial or significant portion of its stock-in-trade, books,, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting or relating to specified secual [sic] activity or specified anatomical areas, . . . for observation by patrons therein.' The penalty for violating the ordinance is a fine of up to $250.00 for each day that the establishment operates in violation of the ordinance.

The ordinance was adopted by the Town Board on May 9, 1990. Apparently, this ordinance was not accepted by the New York State Department of State ("Department of State") and therefore it did not become law. However, the ordinance was renumbered as Local Law No. 1 of 1990 and became effective when it was refiled with the Department of State on January 31, 1991. The only difference between @ Law No. I and @ Law No. 5, the original ordinance, appears to be its numerical designation.

On October 28, 1991, Route 17's adult bookstore opened for business. Three days later, Patelunas purchased an adult magazine and video at the premises. That same day, October 31, 1994, Patelunas delivered a 'Cease and Desist Order" to Route 17 and T & R Realty which stated:

PLEASE BE ADVISED that you are in violation of the Law No. I for the year 1990 known as The Regulating of the Operation and Maintenance of Adult Book Stores."

YOU ARE HEREBY ORDERED AND DIRECTED to cease violation on or before November 7, 1991.

In the event you continue in violation of said Law, the appropriate legal proceedings will be commenced against you.

Route 17 complied with the October 31, 1999 order and ceased operation on November 7, 1991. Route 17's business has remained closed since that time.

DISCUSSION

1. Standards for Summary Judgment

A motion for summary judgment may be granted only when there is no genuine issue of material fact remaining for trial and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

All ambiguities and inferences must be resolved in favor of the non-moving party and all doubts as to the existence of a genuine material issue for trial should be resolved against the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Brady v, Town of Colchester, 863 F.2d 205, 210 (2d Cir. 1988).

If, when '[v]iewing the evidence produced in the light most favorable to the nonmovant . . . a rational trier could not find for the nonmovant, then there is no genuine of issue of material fact and entry of summary judgment is appropriate." Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991); Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir. 1991); Coach Leatherware Co. V. AnnTaylor, Inc., 933 F.2d 162, 167 (2d Cir. 1991).

Finally, the fact that both parties have moved

for summary judgment does not mean that the Court must grant summary judgment for one of the parties, and it does not change the burden on the moving party to show the absence of a genuine issue of fact. Eastman Mach. Co. v. United States, 841 F.2d 469, 473 (.2d CIT. 1988). Each party's motion must be evaluated on its own merits and all reasonable inferences must be drawn against the party whose motion is under consideration. Schwabenbauer v. Board of Educ. of Olean, 667 F.2d 305, 314 (2d Cir. 1981).

II. Constitutionality of Local Law No.1

Route 17 moves for summary judgment and for entry of a permanent injunction on its claim that the ordinance is unconstitutional, void and unenforceable as written and as applied under the First and Fourteenth Amendments. In particular, Route 17 maintains that this ordinance is a 'content-based' regulation of speech and constitutes a "prior restraint' that is prohibited under well-established constitutional principles. In its view, the ordinance, in effect, bans the selling of constitutionally protected material.

Defendants contend that the ordinance is a valid zoning ordinance designed to address the secondary

effects of adult bookstores. They maintain that the ordinance is a "contentneutral' time, place and manner regulation because its purpose is to limit the operation of certain @s of businesses in certain areas of the Town. According to defendants, the ordinance does not ban adult bookstores; it just restricts their maintenance in certain areas. Defendants have cross-moved for summary judgment on the grounds that the ordinance is not unconstitutional on its face or as applied to Route 17.

There is no dispute that, as a general proposition, Route 17's operation of the bookstore involves 'expression" that is protected by the First and Fourteenth Amendments. There is also no claim that Route 17's stock-in-trade is obscene and, therefore, not protected by the First Amendment.

The initial inquiry into the constitutionality of the ordinance is, therefore, whether it is a content-based or content-neutral zoning ordinance. City of Renton v. Playtime Theaters, n@, 475 U.S. 41P 46 (1986); Young v. American Mini Theaters, Inc., 427 U.S. 50, 63 (1976); ILQ Investments, Inc., v. City of Rochester, 816 F.Supp. 516, 524 (D.Minn. 1993).

A) Content-based Versus Content-neutral

Route 17 maintains that the ordinance is a

content-based zoning ordinance because its purpose is to prohibit the sale of adult material based solely on its content. Defendants contend that the Ashland ordinance seeks to prevent the secondary effects of adult bookstores and as such, is a content-neutral time, place and manner regulation.

The purpose of content-based ordinances is to restrain certain types of speech or expression and as such, they are presumptively violative of the First Amendment. Renton, 475 U.S. at 46-47; Carey v. Brown, 447 U.S. 455, 462-63 n.7 (1980). Content-neutral regulations, on the other hand, regulate activities without reference to the content of the speech or expression and are presumptively valid. Virginia State Bd. of Pharmacy v,. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); ILQ Investments, 816 F.Supp. at 524.

The Supreme Court has settled the issue of whether regulations which dictate where sexually-orientated businesses can locate are to be considered content-based or content-neutral time, place and manner regulations. In Renton, supra, the Court stated that w[alt first glance, the Renton ordinance, like the ordinance in American Mini Theaters, Inc. does not appear to fit neatly into the 'content-based'

or the 'content-neutral' category.' 475 U.S.

47. However, because the ordinance was not aimed at the content of the films to be shown at the theater, but rather at the secondary effects that such businesses had on the surrounding community, the Court held that it was to be "reviewed under the standards applicable to content-neutral' time, place and manner regulations." Renton, 475 U.S. at 49.

The ordinance at issue here is similar to the zoning ordinance at issue in Renton. There, the ordinance in question prohibited adult movie theaters from locating within 1000 feet of any residential zone, single or multi-family dwelling, church, park or school. The Supreme Court held that this 'ordinance represents a valid governmental response to the 'admittedly serious problem' created by adult theaters.' Id. at 54. Moreover, the Supreme Court found that the city did not use "'the power to zone as a pretext for suppressing expression,' but rather ... sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas.' Id.

On its face, the Town's ordinance states that it

is designed to combat the 'adverse effects" that adult bookstores have on the surrounding neighborhood and the threat that such enterprises pose to the 'welfare and safety" of the public. LoW Law No. 1, Art. I. This statement of the Town's intent in enacting the ordinance "is more than adequate to establish that the [Town's] pursuit of its zoning interests . . . was unrelated to the suppression of free expression" and, therefore, the ordinance may be characterized as a content-neutral time, place and manner regulation. IL at 48. "[A] city's 'interest in attempting to preserve the quality of . . . life is one that must be accorded high respect'." Id. at 50 (quoting American Mini Theaters, 427 U.S. at 71).

Having determined that the ordinance is a content-neutral time, place and manner regulation does not, however, end the inquiry. Content-neutral time, place and manner regulations may still be unconstitutional unless they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Renton, 475 U.S. at 47; Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 7899 807 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48

(1981).

B) Substantial Governmental Interest

The Town's stated purpose for the Ashland ordinance is to avoid the secondary effects that adult bookstores have on the adjacent area, which, if not regulated, could contribute to the blighting or downgrading of the surrounding neighborhood or pose a threat to the welfare and safety of the public.' Local Law No. 1 of 1990 at Art. 1, § 1. In Renton, the Supreme Court recognized a city's substantial interest in protecting the quality of life from the secondary effects of adult businesses. 475 U.S. at 50. The Renton Court also recognized, however, that the enacting body must have some evidence before it concerning the ills it seeks to avoid in order to show that the ordinance is designed to serve a substantial governmental interest. This evidence need not be based on empirical data from or particular problems in the Town. According to the Renton Court:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

id. at 51-52.

Therefore, the Town could rely on the experiences and studies of other communities, and the findings relating to these concerns in other state court opinions. See Mitchell v. Commission on Adult Entertainment Establishments of the State of Del., 10 F.3d 123@ 134 (3d Cir. 1.993) (court indicating that city could rely on the "detailed findings summarized in another state"s court opinion); 11126 Baltimore Blvd, v. Prince George's County, Md., 886 F,2d 14159 1422 (4th Cir. 1989). vacated on other grounds, 496 U.S. 901 (1990) (court indicating that county could rely on 'little more than general, nonscientific and conclusory statements about sexually orientated businesses.')

In support of its cross-motion for summary judgment, the Town submitted surveys taken from its residents to demonstrate their concern over the secondary effects of adult bookstores. The Town has also submitted studies from the Town of Islip, New York, Indianapolis, Indiana and Cincinnati, Ohio which discussed the secondary effects of adult bookstores. These studies were reviewed by the Town attorney prior to the enactment of the ordinance. In addition, the Town had before it a decision from the New York State

Court of Appeals which summarized Islip's experience with the secondary effects of adult bookstores and upheld the constitutionality of the Islip ordinance. Generally Town of Islip Caviglia, 73 N.Y.2d 544 (1989). In fact, the Town modeled its ordinance after the Islip ordiance. Route 17 maintains that these submissions are not enough to show a substantial governmental interest because the studies done in, lslip, Indianapolis and Cincinnati deal primarily with the primarily with the secondary effects traditionally associated with adult movie theaters and "Peep shows." According to Route 17, their store deals primarily with 'take home printed books, magazines and other periodicals" which do not have the same secondary effects.

Renton requires only that the Town submit evidence which is "reasonably believed to be relevant to the problem" that the Town is addressing. The Renton court specifically declined to impose "an unnecessary rigid burden of proof" on the city for justifying the enactment of such ordinances. 472 U.S. at 50. The Supreme Court in Renton held that the City of Renton could rely on the experiences of Seattle which were summarized in an opinion issued by the Supreme Court of Washington,' when it enacted its

ordinance.

Here, the Town of Ashland relied not only on the experiences of other cities, but on the concerns of their residents. In addition, the Town had before it a summary of Islip's experiences. This is more than enough evidence to show a reasonable basis for the Town's belief that an ordinance was justified to combat these potential problems. See Genusa v. City of Peoria, 619 F.2d 1203, 1211 (7th Cir. 1980) (holding that a "city need not await deterioration in order to act").

Route 17's contention that the studies relied upon by the Town deal primarily with theaters and peep shows and, therefore, are not reasonably related to the perceived secondary effects of adult bookstores is inaccurate. A review of the material considered by the Town reveals that the studies pertained to the secondary effects of all types of adult entertainment, including adult bookstores. Indeed, Town of Islip v. Caviglia, supra, was a challenge to the Islip regulation as it pertained to adult bookstores, not theaters or peep shows.

Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709 (1978), cert. denied, 441 U.S. 946 (1979).

The Ashland ordinance is, therefore, designed to

serve a substantial governmental interest. The remaining issue is to determine whether the Ashland ordinance allows for alternative means for this type of "expression."

C) Alternative Avenues of Communication

"It is, of course, clear that 'a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate'." Mitchell, 10 F.3d at 139 (quoting Taxpayers for Vincent, 466 U.S. at 812). Therefore, the final inquiry into the constitutionality of Ashland's ordinance is to determine whether it allows for alternative avenues of communication and whether these alternative avenues are adequate. Renton, 475 U.S. at 53; Lakeland Lounge of Jackson, Inc, v. City of Jackson, Miss., 973 F.2d 1255, 1259 (5th Cir. 1992), cert. denied, 113 S.Ct. 1845 (1993). In other words, does the ordinance afford Route 17 a reasonable opportunity to open and operate an adult bookstore in compliance with the ordinance within the Town?

"The Supreme Court has made clear that zoning regulations that ban activities in some parts of a community but not others do not limit unreasonably other alternative avenues of communication." Marty's

Adult World of Enfield, Inc, v. Town of Enfield Ct., 20 F.3d 512, 516 (2d Cir. 1994) (citing Renton, 475 U.S. at 53-54; Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 75-76 (1981)).

Ordinances which zone businesses out of existence or prohibit all types of speech or expression have been held to preclude alternative avenues of communication and are, therefore, unconstitutional. See Schad, 452 U.S. at 66 (1981) Local ordinance prohibited all live entertainment including non-obscene, nude dancing); Erznoznik v. City of Jacksonville, 422 U.S. 2059 213 (1975) Local ordinance prohibited "display of all films containing uncovered buttocks or breasts," regardless of context).

On its face, Ashland's ordinance does not prohibit all adult bookstores. Route 17 contends, however, that the practical effect of the Ashland ordinance is to do just that -eliminate all adult bookstores. I disagree. I believe that the proof shows the contrary. The Town has identified several parcels, some on the same interstate highway where Route 17's establishment is currently located and another parcel owned by an owner of T & R Realty and Route 17, which can be used to operate an adult

bookstore.

Route 17 contends, however, that these available parcels of land make up only . I % of the entire acreage of the Town. In addition, Route 17 contends that of the parcels available for operation of an adult bookstore, most are either not for sale or are not economically ideal for such a venture.

First of all, the fact that the available parcels of land are not for sale or are less desirable for economic reasons is not controlling. "The inquiry for First Amendment purposes is not concerned with economic impact." Renton, 475 U.S. at 54 (quoting American Mini Theaters, 427 U.S. at 78). There is no requirement that the alternate sites be economically viable or that they be for sale. Lakeland Lounge, 973 F.2d at 1260. "[Route 17] must fend for [itself in the real estate market, on an equal footing with other prospective purchasers and lessees." Renton, 475 U.S. at 54.

With respect to the available acreage, a review of the survey maps and affidavits submitted by the Town and Route 17 reveals that most of the Town is not zoned for business uses. Of those parcels that are zoned for business uses and which are on an interstate highway, where Route 17 is currently located,

approximately 40% could be utilized for the operation of an adult bookstore. (Affidavit Dennis J. Weiland 7-8). See Renton, 475 U.S. at 53 (5% of the land available for adult uses).

Route 17's claim that the ordinance is unconstitutional because in effect, it prohibits the sale of constitutionally protected material is, therefore, without merit and must be rejected. The ordinance is a content-neutral time, place and manner regulation designed to serve a substantial governmental interest which permits alternative means for engaging in the "expression" associated with such an enterprise.

CONCLUSION

Route 17's motion for summary judgment and for issuance of a permanent injunction is denied. Defendants' cross-motion for summary judgment is granted and the complaint is dismissed.

IT IS SO ORDERED.

DAVID G. LARIMER

UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York

June 10 1994.

APPENDIX E

AO 450 (Rev. 5195) Judgment In a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

ROUTE 17 CORPORATION
JUDGMENT IN A CIVIL CASE

V.

TOWN OF ASHLAND SHELDON ROBINSON

EDWARD BLY, EARL STANTON,

ANDREW J. GOTHAM, WALTER JILSON,

CASE NUMBER: 91-CV-6515L

GARY M. PATELUNAS, and JOSEPH J,

BALOK, JR,, ESQ.

Jury Verdict.This action came before the Court for a trial by jury. The issues have been heard and the jury has rendered its verdict.

Decision by Court. This action came to or hearing before the Court. The issues have been heard and a

decision has been rendered.

IT IS ORDERED AND ADJUDGED that the complaint is dismissed. June 13, 1994

Rodney C. Early

Date

APPENDIX F

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ROUTE 17 CORPORATION,

Plaintiff,

ORDER

91-CV-6515

V.

91-CV-6515L

TOWN OF ASHLAND, SHELDON ROBINSON, EDWARD BLY, EARL STANTON, ANDREW J. GOTHAM, WALTER JILSON, GARY M.

PATELUNAS and JOSEPH J. BALOK, JR. 2 ESQ.

Defendants.

A dispute has arisen between the parties as to whether certain material should be included as part of the record on appeal. Specifically, the dispute arises in connection with plaintiff's preparation of the Appendix.

The parties have submitted several letters to the Court in support of their respective positions.

There are three groups of materials that are in dispute, all of which were contained in a file maintained by attorney Joseph J. Balok, Jr. ("Balok file"):

1. Copies of studies and support materials which were used by the Town of Islip in developing its local regulation of adult entertainment;

2. A number of surveys sent to and completed by residents of the Village of Wellsburg ("Wellsburg surveys");

3. A memorandum and attachments from the Chemung County Planning Department dated October 1,

1990.

I have reviewed the materials submitted on the motion for summary judgment, the oral argument and other pleadings in the case, and it is my judgment that all of the above items should be part of the record in this case.

Concerning the Balok file, particularly the Town of Islip studies and support material, this material is mentioned in attorney Balok's affidavit, sworn to January 26, 1996 (i 6), and in that affidavit Balok indicates that he expected counsel for the defendant, Town of Ashland, to supply the file to the Court (I 6). In fact, the file was sent to the Court and the Clerk's docket entry shows that it was received on January 31, 1994.

Concerning the Wellsburg surveys, these were referenced in the affidavit of Ransom P. Reynolds, Esq., sworn to on January 28, 1994, (i 12), as well as the affidavit of attorney Balok (I 4). It appears that these surveys were sent to plaintiff's counsel and were delivered to the Court on or about March 11, 1994. They should be part of the record.

Concerning the memo from the Chemung County Planning Department, that item was also referenced in affidavits submitted by the defendants (i 12 of

affidavit of attorney Reynolds and 1 5 of attorney Balok's affidavit) and was received by the Clerk of the Court on January 31, 1994, as part of the Balok file. It also appears that the same memo was attached to plaintiff's motion for summary judgment as Exhibit I.

All of the above items should be considered part of the record on appeal. Because there are voluminous documents contained in both the Balok file and the Wellsburg surveys, it may not be necessary to include all those items in the Appendix. Rule 30, Fed. R. App. P. clearly provides that not all items in the District Court record need be included in the Appendix.

I will leave the final decision to the parties as to whether these items should be part of the Appendix, in accordance with Rule 30(b), Fed. R. App. P. This decision is meant to clarify for the parties that the above disputed items are part of the record In the District Court and as such they should be available to the Second Circuit on appeal.

IT IS SO ORDERED,

DAVID G. LARIMER

UNITED STATES DISTRICT JUDGE

Dated: Dated: Rochester, New York

September 14 1994.

APPENDIX G NEW YORK
STATE DEPARTMENT OF

STATE 162 Washington Avenue

Local Law Filing

DEPARTMENT of Ashland
Town
1991

Local Law N. 1 of the year 1990

A local law to be known as "THE REGULATING OF THE OPERATION AND MAINTENANCE OF ADULT BOOKSTORES"

Be it enacted by the Town Board

Town of Ashland

ARTICLE I

SECTION 1. Findings; purpose.

In the development and execution of this Local Law, i@ is recognized that adult bookstores,, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent area. Special regulation of such uses is necessary to ensure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood or pose a threat to the welfare and safety of the public.

SECTION 2, Definitions,

As used in this Local Law, the following terms shall have the meanings indicated:

ADULT BOOKSTORE - An establishment having, as a substantial or significant portion of its stock-in-trade, books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting or relating to specified secual activity or specific anatomical areas, as defined below, for observation by patrons therein.

SPECIFIED ANATOMICAL AREAS:

A. Less than completely and opaquely covered human genitals, public region, buttock and female breast below a point immediately above the top of the areola,

B. Human male genitals in a discernibly turgid

state,, even if completely and opaquely covered.

SPECIFIED SEXUAL ACTIVITIES:

A. Human genitals in a state of sexual stimulation of arousal.

B. Acts of human masturbation, sexual intercourse or sodomy. (If additional space Is needed, attach pages the same size as this sheet, and number each.) DOS-239 (Rev. 7/90)

C, Fondling or other erotic touching of human genitals, public region, buttock or female breast.

SECTION 3, Proximity to residential dwellings or other adult bookstores,

It shall be unlawful to hereafter establish any adult bookstore within five hundred (500) feet of any building containing a residential dwelling or rooming unit or to establish any adult bookstore within five hundred (500) feet of any other adult bookstore.

SECTION 4. Proximity to School and School bus stops,

It shall be unlawful to hereafter establish any adult bookstore within five hundred (500) feet of the real property line of any public, private or parochial school or within one hundred fifty (150) feet of a bus stop for the picking up and dropping off of school children.

SECTION 5. Proximity to libraries, parks and places of worship,

It shall be unlawful to hereafter establish any adult bookstore within one thousand (1000) feet of the nearest property line of -.-@y public or private, library,, park or playground and at least five hundred (500) feet from the nearest property line of any church, convent, monastery, synagogue or other place of worship.

SECTION 6, Penalties for offenses,

Any person who violates any of the provisions of this local law shall be guilty of a violation and subject to a fine not to exceed Two Hundred Fifty ($250.00) Dollars, Each day during any portion in which any violation of this Iocal Law is committed, permitted or continued shall constitute a separate offense,

ARTICLE II

SECTION 7, Unlawful to promote.

It shall be unlawful and a misdemeanor, punishable as authorized by state law, for any person to promote or possess with intent to promote any obscene material when knowing of its content and character, Each day that said violation continues may be treated as a separate offense.

SECTION 8, Presumptive evidence,

A person who promotes obscene material or possesses the same with intent to promote it,, in the course of his business, is presumed to do so with knowledge or its content and character,

SECTION 9, Definitions.

For the purposes of this Local Law.,the following terms shall have the meanings indicated-.

MATERIAL - Anything tangible, capable of being used or adapted to ,-arouse interest,, whether through the medium of reading, observation, sound or in any other manner.

OBSCENE - Any material or performance is "obscene" if the average person, applying contemporary community standards, would find that, considered as a whole, its predominant appeal is to the prurient interest in sex and depicts. or describes, in a patently offensive manner, actual or simulated sexual intercourse, sodomy,, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals and, as considered as a whole,, it lacks serious literary, artistic, political and scientific value. Predominant appeal shall be judged with reference to ordinary adults, unless it appears from

the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audiences.

PROMOTE - To manufacture,, issue, sell, give, provide,, lend,, mail, deliver, transmute, publish, distribute, circulate, disseminate, present,, exhibit or advertise or to offer or agree to do the same.

SECTION 10. Presumptions.

A* A person who promotes or wholesale promotes obscene material or possesses the same with intent to promote or wholesale promote it, in the course of his business, is presumed to do so with knowledge of its content and character,

B. A person who possesses six (6) or more identical or similar obscene articles is presumed to possess them with intent to promote the same.

SECTION 11. Penalties for offenses.

Any person who violates any of the provisions of this Local Law shall be guilty of a violation and subject to a fine not to exceed Two Hundred Fifty ($250.00) Dollars. Each day during any portion in which any violation of-this Local Law is committed, permitted or continued shall constitute a separate offense.

ARTICLE III

SECTION 12, Definitions,

HARMFUL TO MINORS - That quality of any description or representation, in whatever form, or nudity,, sexual conduct, sexual excitement or sadomasochist abuse when it;

A. Predominantly appeals to the prurient,, shameful or morbid interest of minors.

B. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

C. Is, when taken as a whole, lacking in serious

literary, artistic, political or scientific value for minors.

KNOWINGLY - Having a general knowledge of, or reason to know,, or a belief or grounds for belief which warrants further inspection or inquiry or both:

A. The character and content of any material described herein
which is reasonably susceptible to examination by the defendant; and

B. The age of the minor, provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable, bona fide attempt to ascertain the true age of such minor.

MINOR - A person less than seventeen (17) years of age.

SADINASICGUSTUC ABUSE - Actual or explicitly simulated flagellation or torture by or upon a person who is nude or chad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of the one so clothes.

SEXUAL CONDUCT - Actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse or physical contact in an act of- apparent sexual stimulation or gratification with a person's clothed or unclothed genitals,, public area, buttocks, or if such be female, breast,

SEXUAL EXCITEMENT - The condition of human male or female, genitals when in a state of sexual stimulation or arousal.

SEXUALLY EXPLICIT NUDITY - A state of undress so as to expose the human male or female genitals,, public area or buttocks with less than a fully opaque covering, or the showing of the female breast with less @ a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

SECTION 13. Unlawful acts.

A. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(1) Any picture, photograph, drawing, sculpture,, video cassette,, motion-picture film or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors; or

(2) Any book, pamphlet, magazine, or printed matter,, however reproduced,, or sound recording which contains any manner enumerated in Subsection A(1) of this section or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

Be It shall be unlawful for any person knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor to any area of premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors or to exhibit any such motion picture at any such area of premises which is not designated to prevent viewing from any public way of such motion picture by minors not admitted to any such area of premises.

Co It shall be unlawful for any minor falsely to represent to any person mentioned in Subsection A or B hereof, or to his agent, that such minor is seventeen (17) years of age or older, with the intent to procure any material set forth in Subsection A or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Subsection B.

D. It shall be unlawful for any person knowingly to make a false representation to any person mentioned in Subsection A or B hereof, or to his agent, that he is the parent or guardian of any minor or hat any minor is seventeen (17) years of age or older with the intent to procure any material set forth in Subsection A or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Subsection B,

E. It shall be unlawful for any person knowingly to exhibit, expose or display in public, at newsstands or at any other area of a public or commercial establishment frequented by minors or where minors are or may be invited as part of the general public:

(1) Any picture, photograph, drawing, sculpture, motion-picture film or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse which is harmful to minors; or

(2) Any book, pamphlet, magazine or printed matter., however reproduced,, or sound recording which contains any matter enumerated in Subsection E(1) of this section or explicit or detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

SECTION 14. Exceptions,

Nothing contained in this Local Law shall be construed to apply to:

A. The purchase, distribution, exhibition or loan of any work of art, book, magazine or other printed or manuscript material by any accredited museum, library, school or institution of higher learning.

B. The exhibition or performance of any play, drama, tableau or motion picture by any theater, museum, school or institution of higher learning,, either supported by public appropriation or which is

an accredited institution supported by private funds,

C. Persons who may possess or distribute obscene matter or participate in conduct otherwise prescribed by this Local Law when such possession, participation distribution or conduct occurs in the course of law enforcement activities or in the course of bona fide scientific, educational or comparable research or study or like circumstances of justification.

SECTION 15, Penalties for offenses,

Any person who violates any of the provisions of this Local law shall be guilty of a violation and subject to a fine not to exceed Two Hundred Fifty ($250.00) Dollars. Each day during any portion in which any violation of this Local law is committed, permitted or continued shall constitute a separate offense.

SECTION 16. Severability,

Should any section or provisions of this Local Law be declared by any court to be unconstitutional or invalid,, such declaration shall not affect the validity of this Local Law as a whole or any part thereof, other than the part so declared to be unconstitutional or invalid.

SECTION 17, Effective Date.

This Local Law shall become effective immediately upon filing with the New York Secretary of State.

APPENDIX H
COMPREHENSIVE ZONING PLAN
TOWN OF ASHLAND
CHEMUNG COUNTY, NEW YORK

Zoning Ordinance Adopted
November 13, 1963

Comprehensive Zoning Plan
Local Law No. 1 of 1978
Adopted Sept. 13, 1978

Amended Local Law 01, 1980

Special Flood Hazard Resolution Page #42 Adopted June 11, 1980

Flood Insurance Rate Map
on file at Town Clerks Office

COMPREHENSIVE ZONING PLAN FOR THE TOWN OF ASHLAND CHEMUNG COUNTY, NEW YORK.

Be it enacted by the Town Board of the Town of Ashland t Chemung County, New York as follows:

ARTICLE I @ PURPOSES

Section 1. Enactment and Purposes

There is hereby established a comprehensive zoning plan for the Town of Ashland, Chemung County# New York, which plan is set forth in the text, maps, and schedules which constitute this local law, Said plan is adopted for the purposes set forth in Article 16 Chapter 62 of the Consolidated Laws of the State of New York, and more particularly for the protection and promotion of the public health, safety# convenience, morals and general welfare of the community as

follows:

1. To guide the future growth and development of the Town in accordance with a comprehensive plan of land use and population density that represents and pro@ motes beneficial and convenient relationships among

residential, commercial, industrial and public areas within the Town, considering the suitability of each area for such uses, as indicated by existing conditions, trends in population and mode of living.

2. To provide adequate light, air and privacy; to secure safety from fire, flood and other danger, and to prevent overcrowding of the land and undue congestion of the population.

3. To protect and conserve the character, the environment and the stability and value of all parts of the Town and to encourage the orderly and beneficial development of all parts of the Town.

4. To bring about the gradual conformity of the uses of land and buildings throughout the Town to the comprehensive Zoning Plan set forth in this Local Law, and to minimize conflicts among the uses of land and buildings.

5. To promote the beneficial circulation of traffic throughout the Town, having particular regard to the avoidance of congestion in the streets and the provision of safe and convenient traffic movements.

6. To provide a guide for public policy and action in the efficient provision of public facilities and services for private enterprise in building development, investment and other economic activity relating to uses of land and buildings throughout the Town,

ARTICLE II DEFINITIONS

Section 2. Definitions

For the purpose of this local law, certain words and terms shall have the meaning specified in this section. Except where specifically defined herein, all words used in this local law shall carry their customary meanings. Words used in the present tense include the future; the singular number includes the plural and the plural the singular. The word 'lot' includes the words "plot" or "parcel". The word

"building" includes the word "structure". The words "used" or "occupied" include the words "designed or intended to be used" or "designed or intended to be occupied". The word "person" includes the words "firm". "association", "organization". "partnership". "trust". company. "corporation". and "individual", The word "shall" is intended to be mandatory.

Boarding House - Any dwelling in which more than three persons either individually or as families, are housed or lodged with or without meals for which compensation'-!-s'-paid, either directly or indirectly. The term "boarding house,' shall include "rooming house",, "lodgind house",, but not "foster home".

Dwelling @ A building designed or used exclusively

living quarters for one or more families. A dwelling shall not be deemed to include an automobile court, motels hotel, boarding house, tourist home or tent.

Dwelling Unit @ A building or portion thereof providing complete living facilities for one family,

Hotel - A building containing rooms intended to be used, rented, or hire(I out to be occupied for sleeping purposes by guests and where only a general kitchen and dining 'room and other customer features are provided within the building or in an accessory build@ inn. Motel @ Any building or group of buildings, detached or in connected units, designed for or used as individual sleeping units and provided with automobile parking space convenient to each unit and including incidental services for a transient clientele, The term "motel" shall include "tourist court',# automobile court". and "Motor lodge".

ARTICLE III - ESTABLISHMENT OF DISTRICTS AnD APPLICATION OF DISTRICT REGULATION

Section 3 @ Districts Established

The Town of Ashland is hereby divided into the following types of zoning districts:

Residence-AgriculturalRA	
Residence	R-1
Residence	R-2
Business	B.
Flood Hazard Overlay	FH
Planned Development	PD

Section 4 - Zoning Map

The boundaries of the zoning districts hereby established are shown on the Official Zoning Map, which, together with all explanatory matter thereon, is hereby adopted by reference and declared to be a part of this local law. The Official Zoning Map shall be identified by the signature of the Supervisor attested by the Town Clerk following the words: "This is to certify that this is the Official Zoning Map referred to in Section 4 of the Zoning Law of the Town of Ashland. No amendment to this local law which involves matter portrayed on the Official Zoning Map shall become effective until after such change and entry has been made on

said map. The official zoning map shall be kept on file in the office of the Town Clerk,"

ARTICLE. SCHEDULE OF DISTRICT

REGULATIONS.

Section 16

District regulations shall be set forth in the schedule of District Regulations which is hereby adopted by reference and declared to be a part of this local law. The regulations appearing in this Schedule are subject to the supplementary

provisions of this local law*

SCHEDULE OF DISTRICT REGULATIONS

DISTRICT	PERMITTED PRINCIPAL USES	PERMITTED ACCESSORY USES
B	Retail stores bank, restaurant outdoor professional or and business office and similar establishments	
	Service shops and studios such as shoe repair barber, beauty parlor	
	Retail outlets for cleaning, or pressing, and dyeing.	
	Gasoline service stations.	
	Motel, hotel, theater, drive-in.	
	Automobile sales or servicing garage for the repair and storage of automotive vehicles.	
	Wholesale storage and warehousing in roofed structures.	
	Building, plumbing, electrical and similar contractor's establishments, provided all storage of supplies is in a roofed structure.	
	Commercial miniature or "Par-3 golf course or driving range.	

Section 44 - Amendments, How Initiated

The Town Board may from time to time on its own motion or on petition amend, supplement, repeal, or change the regulations and district boundaries established by this local law. The Planning Board may, by resolution, propose an amendment, supplement, change or repeal of the regulations or district boundaries to the Town Board.

Section 45 @ Referral of Proposed

Amendments to Planning Board

All proposed amendments originating by petition or by motion of the Town Board shall be referred to the Planning Board for a report and recommendations before the Town Board acts thereon. The Planning Board shall submit its report within sixty (60) days after receiving such referral.

Section 46 @ Notice and Hearing on Proposed Amendments

Before any amendment, supplements repeal, or change in the regulations or district boundaries, there shall be public notice and hearing thereon as provided by law.

APPENDIX I

AMENDMENTS TO THE CONSTITUTION

Amendment I

(Freedo)yi of Religion, of Speech, and *of the Press)*

Congress shall make no law respecting an establishment or religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and petition the Government for a redress of grievances.

Amendment XIV

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United

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States and of the States wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.